FILE COPY

SEP 22 1949

CHARLES ELMORE CROP
CLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 346

LEON KAMINER,

Petitioner,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION AND BRIEF IN SUPPORT

JACK WASSERMAN,
IRVING JAFFE,
Attorneys for Appellant,
Warner Bldg.,
Washington 4, D. C.

GASPARE CUSUMANO,
THOMAS M. COOLEY, II,
Of Counsel.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Reasons for Granting the Writ	7
Argument	9
Conclusion	29
Appendix	32

Citations

Cases:

Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 224	10, 12
Ahrens v. *Clark*, 335 U. S. 188	7, 29
American Casualty Co. v. *Howard*, 173 F. (2d) 924	11
Azzollini v. *Watkins*, 172 F. (2d) 298	14
Brandt v. *District Director*, 40 F. Supp. 371	10
Camaratta v. *Miller*, 79 F. Supp. 643	14
Chin Yow v. *U. S.*, 208 U. S. 8	10, 16
Clark v. *Memolo*, No. 10078 (Court of Appeals D. C.), May 9, 1949	11
Eisenstrager v. *Forrestal*, 174 F. (2d) 961	26
Eisler v. *Clark*, 77 F. Supp. 610	14
Estep v. *United States*, 327 U. S. 114	13
Ex Parte Petkos, 212 Fed. 275, 214 Fed. 978	19
Firemen's Fund Ins. Co. v. *Crandall Morse Co.*, 47 F. Supp. 78	10
Geigiow v. *Uhl*, 239 U. S. 3	10, 13
Ginn v. *Biddle*, 60 F. Supp. 530	11
Gung You v. *Nagle*, 34 F. (2d) 848	19
Hearst Radio v. *F.C.C.*, 167 F. (2d) 225	14
Hirabayashi v. *United States*, 335 U. S. 160	25
Home Bldg. and Loan Asso. v. *Blaisdell*, 290 U. S. 398	25
Japanese Immigrant Case, 189 U. S. 86	16, 24
Johnson v. *Tertzag*, 2 F. (2d) 40	19
Kirkland v. *Atlantic Coast Line*, 167 F. (2d) 529	14
Knauff v. *Watkins*, 173 F. (2d) 599	8, 20, 26, 29
Korematsu v. *United States*, 323 U. S. 214	25
Kwock Jan Fat v. *White*, 253 U. S. 454	19

Page

Lloyd Sabaudo v. *Elting*, 287 U. S. 329 ..... 17, 18
Ludecke v. *Watkins*, 335 U. S. 160 ..... 24, 25
Matter of Yamashita, 327 U. S. 1 26
Ng Fung Ho v. *White*, 259 U. S. 276 13
O'Connell ex rel. Foo v. *Ward*, 126 F. (2d) 615 19
Panama Refining Co. v. *Ryan*, 293 U. S. 388 28
Perkins v. *Elg*, 99 F. (2d) 408, 307 U. S. 325 ..... 7, 9, 10
Schechter Poultry Corp. v. *U. S.*, 295 U. S. 495 28
Scholnick v. *Clark*, 81 F. Supp. 298 14
Tack v. *Clark*, S.D.N.Y. Civil Action No. 42-279, 1948 7
Tod v. *Waldman*, 266 U. S. 113 ..... 10, 19
U. S. ex rel. Brandt v. *District Director*, 30 F. Supp. 371 19
U. S. ex rel. Le Grazie v. *Wallis*, 278 Fed. 838 20
U. S. ex rel. London v. *Phelps*, 222 F. (2d) 288 20
U. S. ex rel. Reimann v. *Martin*, 193 Fed. 795 19
U. S. ex rel. Trinler v. *Carusi*, 166 F. (2d) 457, 168 F. (2d) 1014 ..... 8, 13, 14
Wilson v. *Federal Communications Commission*, 170 F. (2d) 793 24

Statutes and Regulations:

Administrative Procedure Act, Section 10; 5 U.S.C. 1009 ..... 5, 7, 12, 29
Alien Registration Act of 1940, 8 U.S.C.A. 451 15
Anarchist Act of October 16, 1918, 8 U.S.C.A. 137 15
Declaratory Judgment Act, 28 U.S.C. 2201 ..... 5, 7, 9, 11
Executive Order No. 2932, August 8, 1918 21

Immigration Act of February 5, 1917:
Section 3, 8 U.S.C.A. 136 15
Section 16, 8 U.S.C.A. 152 ..... 15, 21, 32

Passport Act of 1918 as amended; 22 U.S.C. 223-226; 40 Stat. 559; 41 Stat. 1217; 55 Stat. 252, 2, 8, 20, 21, 22, 23, 24, 26, 32

Presidential Proclamation:
1473 of August 8, 1914 21
2523 of November 14, 1941 ..... 22, 23, 32

Public Law 552 of 1948 15
Quota Act of 1924; 8 U.S.C.A. 201 15

Page
Rule 57, Rules of Federal Procedure 10
8 Code of Federal Regulations 175.53; 175.57, 20, 22, 23, 24, 30, 34

Miscellaneous:

Admission of Aliens into the United States, Department of State (1932) 24
Dembitz, Racial Discrimination and the Military Judgment, 40 Columbia Law Rev. 175 25
Duvall, Declaratory Actions: Present-Day Uses of a Tested Procedure, American Bar Association Journal, May, 1948 ..... 9, 10
Hearings, Deportation of Aliens:
75th Congress, 1st Sess. (S. 1366) 27, 28
76th Congress, 1st Sess. (S. 411) 27, 28
Immigration and Naturalization Service, Monthly Review:
January, 1945 19
February, 1947 20
Post, The Deportation Deliriums of Nineteen-Twenty 29
Orlow, Deportation under the Administrative Procedure Act, Temple Law Quarterly, July, 1948 14
Report of the Secretary of Labor's Committee on Administrative Procedure, The Immigration and Naturalization Service (1940) 16, 17
Senate Document 248, 79th Cong., p. 275 12
The Import of the Federal Administrative Procedure Act in Deportation Proceedings, 49 Columbia Law Review 73 (1949) 14
13 Columbia Law Review 1013 20
61 Harvard Law Review 1445 14
92 Congressional Record 5654 13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No.

LEON KAMINER,

Petitioner,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT.

The Petitioner, Leon Kaminer, by his attorneys prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit (R. 27) affirming an order of the District Court for the District of Columbia (R. 20) dismissing Petitioner's complaint.

Opinions Below

The opinions below are not yet reported. The opinion of the three judge district court held on March 17, 1949 that an alien seeking entry could not attack the constitutionality

of an Act of Congress and that 22 U. S. C. 223 was constitutional (R. 13). Thereafter, District Judge Holtzoff held on March 22, 1949 that as a matter of discretion an action for declaratory judgment would be denied because *habeas corpus* was available and it would be inconceivable that every exclusion or deportation order should be capable of being reviewed in the District of Columbia, the residence of the Attorney General. He also upheld the administrative action herein on its merits (R. 23). The Court of Appeals on July 11, 1949 upheld the dismissal of the complaint solely because of lack of jurisdiction (R. 27).

Jurisdiction

The judgment of the Court of Appeals was entered on July 11, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether an alien detained at Ellis Island can test the legality of his detention by an action for Declaratory Judgment or review under the Administrative Procedure Act in the District of Columbia, the residence of the Attorney General and the Commissioner of Immigration, or whether *habeas corpus* in New York is his exclusive remedy.

2. Whether the Attorney General was authorized by statute and presidential proclamation to exclude Petitioner without a hearing.

3. Whether such authority was exercised by the Attorney General in conformity with statutory authorization and in conformity with published regulations.

4. Whether the statute as construed and applied by the Attorney General violates the Constitution and whether such alleged violation can be challenged by an alien detained at Ellis Island.

Statement

The Petitioner, an alien, together with his wife and eight-and-a-half-year-old child arrived in the United States on October 16, 1948 in possession of appropriate visas which were issued to them in Paris (R. 2). Subsequent to the commencement of the suit herein, which was instituted on January 5, 1949, Respondents accorded Renee Kaminer and Alexandre Kaminer (wife and child of Petitioner, Leon Kaminer) an immigration hearing and on May 10, 1949 they were admitted to the United States for permanent residence. The case therefore became moot as to the said aliens, and the sole issues herein relate to the Petitioner, Leon Kaminer, who has been detained at Ellis Island without a hearing ever since his arrival there on October 16, 1948.

The complaint alleges that the Petitioner has been detained without a hearing on the charge that his entry would be prejudicial to the interests of the United States (Paragraph 8 of Amended Complaint, R. 2). During the oral argument on the motion to dismiss in the District Court, the Government stated, in response to questioning by Judge Holtzoff, that Petitioner was suspected on reasonable grounds of being affected with communist activity. The "confidential" information upon which this charge is founded has never been revealed to the Petitioner and was received ex parte and while Petitioner was en route to the United States (Paragraph 22 of Answer, R. 12).

Petitioner asserts that he seeks to enter the United States for a lawful purpose, that he has never been engaged in any conduct detrimental to the United States, that his father was executed by the Communists, that he himself fled from the Communists and fought against the Communist regime after joining the Russian Anti-Communist White Army in Turkey. He also alleges that he was interned by the Nazis and tortured by the Russians, and that his deportation would result in persecution or death (Paragraphs 18, 21 and 22

of the Amended Complaint, R. 4). The answer of Respondents (Paragraphs 10, 11 and 12, R. 9, 10) filed on the same day as their motion to dismiss denies some of these allegations and denies the materiality of the remainder of these allegations. For the purpose of a motion to dismiss, Petitioner's allegations should be deemed admitted and Respondents conceded this fact in its brief below (p. 3).

The complaint herein was filed on January 5, 1949 seeking a declaratory judgment and review under the Administrative Procedure Act. A temporary restraining order was issued by Judge Pine on January 8, 1949. An amended complaint was thereafter filed on January 11, 1949 and in response to Petitioner's motion for a preliminary injunction challenging the constitutionality of the statute, a three judge court was convened (R. 7). This three judge court, consisting of Circuit Judge Proctor and District Judges Holtzoff and Letts, ruled on March 7, 1949 that an alien seeking admission could not question the constitutionality of a statute and that in any event the statute was constitutional (R. 13). The case was then remanded to Judge Holtzoff who granted Respondents' motion to dismiss the complaint by order dated April 1, 1949. No disposition was made of Respondents' motion for summary judgment. By the same order bail was denied to the Petitioner. Judge Holtzoff's opinion states that as a matter of discretion declaratory judgment should not be entertained in the District of Columbia and that Petitioner's sole remedy is by way of *habeas corpus* in New York, and that the statutes and the regulations were complied with by Respondents, in view of the exclusion order of the Secretary of State, which was signed on March 3, 1949—after the commencement of the action. On the oral statement of counsel for the government that the entry of Petitioner would be prejudicial to the interests of the United States and without taking any testimony, Judge Holtzoff denied bail and rendered an oral opinion which is set forth in the record at pp. 25-26.

The Court of Appeals affirmed Judge Holtzoff's dismissal of the complaint solely on the ground that this action for declaratory judgment should have been brought in New York. It stated (R. 27, 28):

> "The District Court properly dismissed the action, because it lacked jurisdiction.
>
> "We express no opinion, and mean to intimate none, as to whether the appellant is entitled either to a writ of *habeas corpus* or to a declaratory judgment."

Statutes and Regulations Involved

The Declaratory Judgment Act (28 U. S. C. 2201) provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

The Administrative Procedure Act (5 U. S. C. 1009) provides:

> "Judicial review of agency action.
>
> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion——
>
> (a) Right of review.
>
> Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

* * * * * * *

(c) Acts reviewable.

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . .

(e) Scope of review.

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (June 11, 1946, ch. 324, p. 10, 60 Stat. 243)."

The pertinent portions of the applicable statutes and regulations affecting the merits herein are set forth in the Appendix herein.

Reasons for Granting the Writ

This writ of certiorari is sought because this case raises important questions of Federal jurisdiction and constitutional law.

1. Petitioner asserts that the Court of Appeals erred in prescribing the same jurisdictional limitations for an action for declaratory judgment under 28 U. S. C. 2201 and review under the Administrative Procedure Act, 5 U. S. C. 1009, as was prescribed by the Supreme Court by a divided opinion in *Ahrens* v. *Clark*, 335 U. S. 188, wherein another Federal statute, 28 U. S. C. 432, was interpreted to confine habeas corpus to the jurisdiction of the alien's detention. Declaratory Judgment and review under the Administrative Procedure Act are not and should not be restricted by the same jurisdictional limitations as habeas corpus. In habeas corpus it suffices to bring the action against one's jailer who is usually if not always in the jurisdiction of the place of detention. In the case of declaratory judgment, the necessary party defendants may be in another jurisdiction. Thus it is questionable as to whether petitioner may bring an action for declaratory judgment or review under the Administrative Procedure Act in New York. The government has generally been successful in contending that jurisdiction may only be obtained in the District of Columbia over the Attorney General and the Commissioner of Immigration (*Tack* v. *Clark*, S. D. N. Y., Civil Action No. 42-279, 1948).

It is submitted that the jurisdictional limitations placed herein by the Court of Appeals are in conflict with the rationale of *Perkins* v. *Elg*, 99 F. (2d) 408, 307 U. S. 325, where the Supreme Court approved an action for declaratory judgment in the case of a citizen who was threatened with deportation. The existence of justiciable controversy was deemed sufficient to confer jurisdiction with-

out requiring resort to habeas corpus and without reference to the presence of the individual within the court's jurisdiction. It is further contended by petitioner that the instant decision is in conflict with *U. S. ex rel Trinler* v. *Carusi,* 166 F. (2d) 457 (C. C. A.-3), where review was permitted under the Administrative Procedure Act in a deportation case also without reference to the presence of the individual within the court's jurisdiction. The instant case adds a jurisdictional prerequisite to declaratory judgment actions not heretofore required by Supreme Court decisions or decisions in other circuits. This principle of federal jurisdiction is one which should be reviewed and decided by the Supreme Court.

2. The three judge court below reviewed the constitutional issue raised herein. It decided that 22 U. S. C. 223 was constitutional and that Petitioner had no standing to attack its constitutionality. Petitioner might have appealed from that decision directly to the Supreme Court pursuant to 28 U. S. C. 1253. Petitioner believed that it would be unwise to present this case to this court without first submitting the jurisdictional and statutory issues to the Circuit Court for review so that the case could be presented in its entirety to this Court. For that reason, appeal was taken to the Circuit Court on all issues. The constitutional issues raised herein are identical with those now before the Supreme Court in *Knauff* v. *Watkins,* 173 F. (2d) 599, certiorari granted May 2, 1949. In opposing certiorari in that case, the government in its brief relied upon the three judge court ruling herein to sustain the constitutionality of the statute which is attacked in the *Knauff* case and in this case. It therefore needs no elaboration to show that the constitutionality of 22 U. S. C. 223 and the regulations issued thereunder should be reviewed by the Supreme Court. Certiorari is sought to

review the constitutional issues raised herein with the request that the case be set down for oral argument immediately following the *Knauff* case which presents the identical issue with reference to 22 U. S. C. 223.

ARGUMENT

Point I

Review May Be Maintained under the Declaratory Judgment Act

Under 28 U. S. C. 2201, in case of actual controversy, except with regard to Federal taxes, any court of the United States, upon filing an appropriate pleading, may declare the rights and other legal relations of any interested party.

The prerequisites for obtaining declaratory relief are: (1) A justiciable controversy; (2) A controversy between adverse parties; (3) A tangible legal interest in the controversy by the party asserting it; (4) An issue ripe for adjudication. *Duvall, Declaratory Actions: Present-Day Uses of a Tested Procedure* (American Bar Association Journal, May, 1948). No other jurisdictional prerequisite has ever been required. Heretofore, presence of the Plaintiff in the jurisdiction has not been a prerequisite.

All four factors noted above exist in the instant case and in a similar situation, Declaratory Judgment has been deemed appropriate. In *Perkins* v. *Elg* (District of Columbia, Equity 63, 408) Judge Bailey held:

> "According to the allegations of the bill, the Department of Labor has notified the plaintiff that she is illegally within the United States and has required her to leave the United States, and in case of her not doing, she would be deported as an alien. *Her only recourse would be to submit to arrest and then seek the issuance of a writ of habeas corpus. I think that this belongs to a class of cases for which a declaratory judgment is eminently suited.*" (Italics supplied).

The Circuit Court of Appeals for the District of Columbia on review said (99 F. 2(d) 408):

> "The right to be immune from threats of deportation . . . is, we think, a right within the declaratory judgment act."

Upon review by the Supreme Court (307 U. S. 325) it was ruled that:

> "The court below, properly recognized the existence of an actual controversy with the defendants (Aetna Life Ins. Co. *v.* Haworth, 300 U. S. 227) . . . and we think the decree should include the Secretary of State as well as the other defendants."

Duvall, supra, at p. 434 states:

> "Declaratory judgments and orders as to the rights, powers, duties and obligations of public officers, boards and other public authorities have been made in many cases."

Review has frequently been exercised, in *habeas corpus,* where, as here, petitioner was excluded from the United States and hence was technically not within its borders: *Chin Yow* v. *U. S.,* 208 U. S. 8 (1908); *Gegiow* v. *Uhl,* 239 U. S. 3 (1915); *Tod* v. *Waldman,* 266 U. S. 113 (1924); *Brandt* v. *District Director,* 40 F. Supp. 371 (D. C. N. Y. 1941).

Since the enactment of Rule 57 of Federal Rules of Civil Procedure, the existence of another remedy is no ground for the denial of declaratory judgment. Thus it is stated in *Firemen's Fund Ins. Co.* v. *Crandall Morse Co.,* 47 F. Supp. 78, 81 (D. C. N. Y. 1942)

> "It is urged that each plaintiff has an adequate remedy at law. This objection is unavailing. This is not a suit in equity, and the existence of another remedy does not preclude relief by declaratory judgment. Sun-

shine Mining Co. v. Carver, D. C., 34 F. Supp. 274; Lehigh Coal & Nav. Co. v. Central R. of New Jersey, D. C., 33 F. Supp. 362; Dunlear Co. v. Minter Homes Corp., D. C. 33 F. Supp. 242; Maryland Casualty Co. v. Tindall, D. C., 30 F. Supp. 949, affirmed 8 Cir., 117 F. 2d 905. Further, Rule 57 of the Federal Rules of Civil Procedure says: 'The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.' "

See also *Ginn* v. *Biddle,* 60 F. Supp. 530 (E. D. Pa. 1945).

It is therefore submitted that declaratory relief is available here. The court has undoubted jurisdiction of the parties. An actual controversy is presented. And the court has jurisdiction to review the controversy. Nothing more is required.

The recent case of *Clark* v. *Memolo,* No. 10078 (Court of Appeals, D. C. May 9, 1949) is not controlling. There declaratory judgment was refused in a criminal case, because the matter had been previously adjudicated *judicially.*

The court below stated that the instant action was "substantially similar to an application for a writ of habeas corpus" (R. 28) and then treated it as though it were in fact a writ of habeas corpus and subject to its jurisdictional limitations. In this, it is submitted the court erred. This is an action for declaratory judgment, brought pursuant to 28 U. S. C. 2201. Heretofore it has been recognized that under appropriate circumstances courts may decline as a matter of judicial discretion to entertain declaratory judgment actions where good reasons exist for such refusal. *American Casualty Co.* v. *Howard,* 173 F. (2d) 924 (C. C. A. 4, 1949). Such discretion however will be liberally exercised to effectuate the purposes of the statute and thereby afford relief from uncertainty and insecurity with respect to rights and status. *American Casualty Co.* v. *Howard, supra.*

In the instant case, the Circuit Court affirmed the dismissal because of lack of jurisdiction. The action was not taken on the basis of a sound judicial discretion but on a jurisdiction ground. In this, we think the court erred.

The instant case meets the test set forth by the Supreme Court in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 224, 240. There the court said:

> "It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative. . . ."

Jurisdiction existed here to determine the instant controversy in the District of Columbia in an action for Declaratory Judgment. The issues raised were purely issues of law. Petitioner's presence in the District of Columbia was not necessary to resolve these issues. Dismissal of the action either as a matter of discretion because too many actions could be brought against the Attorney General as the District Court believed (R. 23, 24) or as a matter of jurisdiction as announced by the Court of Appeals (R. 28) was error.

Point II

Review May Be Maintained under the Administrative Procedure Act

Section 10 of the Administrative Procedure Act (5 U. S. C. 1009) authorizes judicial review except (a) where a statute precludes it; or (b) where agency action is by law committed to agency discretion. Review may be sought by any person suffering legal wrong or adversely affected or aggrieved.

The legislative history of the Act indicates that review may be obtained in immigration matters. Thus in the House Committee Report (1946) at p. 41 (S. Doc. 248, 79th Cong., p. 275) it was said:

> "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon

its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide review is certainly no evidence of intent to withhold review."

See also: 92 Congressional Record 5654.

In *U. S. ex rel. Trinler* v. *Carusi,* 166 F. 2(d) 457 (C. C. A.-3), the majority of the court concluded that:

"The nub of the question seems to us to be whether these deportation proceedings are such as to fall within the first exception to section 10 as a proceeding provided by a statute which 'precludes judicial review.'

"Our conclusion is that the case does not fall within the exemption. We are impressed by the fact that in spite of the basic statute's wording habeas corpus proceedings have always been available. Since they have been available the situation cannot be one where judicial review in the past has been precluded. In this we are supported, we think by the discussion found in the legislative history of the Act. In that discussion it was pointed out that statutes which preclude judicial review are unusual."

Subsequently, the Third Circuit declared the action abated because of the failure to make timely substitution of the new Commissioner of Immigration. 168 F. 2(d) 1014. The opinion was not withdrawn and its reasoning and logic remain.

The majority opinion of the Trinler case is reinforced by additional decisions. In *Estep* v. *United States,* 327 U. S. 114 it was stated:

"The silence of Congress as to judicial review is not necessarily to be construed as a denial of the courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them. *School of Magnetic Healing v. McAnnulty* 187 U. S. 94; *Geigow v. Uhl* 239 U. S. 3; *Stark v. Wickard* 321 U. S. 288. Judicial review may indeed be required by the Constitution. *Ng Fung Ho v. White* 259 U. S. 276."

It will be noted that the cases of *Geigow* v. *Uhl* and *Ng Fung Ho* v. *White* involved the immigration processes. In

Kirkland v. *Atlantic Coast Line,* 167 F. 2(d) 529, 530 (C. A. D. C. January 20, 1948) it was also asserted with specific reference to the Administrative Procedure Act that "the mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." That section 10 of the Act is broad was recognized in *Hearst Radio* v. *F. C. C.,* 167 F. 2(d) 225 (C. A. D. C.).

Azzollini v. *Watkins,* 172 F. 2(d) 298 (C. C. A.-2, 1949) recognized the force of the *Trinler* opinion but left that issue open insofar as the Second Circuit was concerned.

Judge Morris in *Scholnick* v. *Clark,* 81 F. Supp. 298 (D. C. 1948) referring to the *Trinler* case stated:

> "In the light of the decision last quoted, and there is no decision to the contrary, it seems that there is not only judicial review of deportation proceedings by habeas corpus, but a statutory judicial review of the deportation order as well."

The Trinler principle has been followed in several subsequent cases: *Camaratta* v. *Miller,* 79 F. Supp. 643 (S. D. N. Y., 1948); *Eisler* v. *Clark,* 77 F. Supp. 610 (D. C. 1948).

The principles announced above should apply equally to exclusion as well as to expulsion cases. See also: *Orlow, Deportation under the Administrative Procedure Act,* Temple Law Quarterly (July, 1948); *The Import of the Federal Administrative Procedure Act on Deportation Proceedings,* 49 Columbia Law Review 73 (1949); 61 Harvard Law Review 1445 (1948).

The Circuit Court below did not discuss or rule upon the Administrative Procedure Act. It is submitted that it erred in failing to decide that this action could be maintained under the Administrative Procedure Act in accordance with the principle enunciated in *U. S. ex rel Trinler* v. *Carusi,* 166 F. (2d) 457.

Point III

Petitioner Was Denied an Administrative Hearing in Violation of Law and the Constitution

It was conceded in the District Court, and it is undisputed that Petitioner was not given a regular Board of Special Inquiry hearing, was not advised of the charge on which he is being detained and was denied representation by counsel.

It is submitted that Petitioner is entitled to a hearing under the due process clause of the Fifth Amendment and as a matter of statutory construction.

For over fifty years hearings have been accorded to arriving aliens. The basic immigration statute in force today provides for a hearing. Under the Act of February 5, 1917, arriving aliens are accorded a hearing before a Board of Special Inquiry (8 U. S. C. A. 152).

Grounds of exclusion are set forth under Section 3 of the 1917 Act (8 U. S. C. A. 136). Subsequent to this 1917 Act, the 1918 Anarchist Act was enacted excluding communists and other subversives (8 U. S. C. A. 137). Hearings are granted arriving aliens who are excludable under this Act. In 1924 the Quota Law was enacted (8 U. S. C. A. 201). Hearings are granted aliens excludable under this act. In 1940 the Alien Registration Act was enacted (8 U. S. C. A. 451). Hearings are granted under this Act. Recently, the Immigration laws were amended to exclude aliens whom the Attorney General believes are seeking entry to engage in activities endangering the public safety (Public Law 552 of 1948). Hearings are granted under this statute.

The hearings granted under successive immigration acts are not matters merely of legislative decree but are required by the Constitution. This principle is established by cases decided both before and after such hearings were first given

statutory basis. The early cases on the subject dealt exclusively with the question whether either in deportation or exclusion an alien had the right to claim a full judicial due process hearing on the merits and concluded that he did not. The first case in which the Court was squarely faced with the question whether an alien was entitled to a fair administrative hearing even though denied full judicial hearing was the *Japanese Immigrant* case, 189 U. S. 86 (*Kaoru Yamataya* v. *Fisher*), 47 Law Ed. 721, 1903. In this case the court states:

> "But this Court has never held, nor must be now understood as holding, that administrative officers when executing the provisions of a statute involving the liberty of persons may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends."

The *Japanese Immigrant* case involved the deportation of an alien who had in fact entered though she was excludable at the time of her entry. Five years later, in *Chin Yow* v. *United States,* 208 U. S. 8 (1908) this doctrine was applied to require that a fair hearing be given an individual asserting citizenship who had been excluded. In that case the court dealt explicitly with the question whether any legal wrong is done to a person who is merely turned back from the borders of the country, pointing out that in the circumstances of aliens arriving by boat from abroad it must be recognized that their liberty is infringed if they are arbitrarily denied entry.

In a Report entitled "The Secretary of Labor's Committee on Administrative Procedure, The Immigration and Naturalization Service" by Marshall E. Dimock, Henry M.

Hart and John McIntire (1940) it is noted that the *Chin Yow* case is not confined to citizenship claims (p. 44). The report states at pages 44-45 that "The final doctrine of the Supreme Court—with respect to the scope of judicial inquiry not only into the fairness of the hearing but into other matters—may be summarized in the language of Mr. Justice Stone, speaking for the Court in *Lloyd Sabaudo Societa* v. *Elting,* 287 U. S. 329, 335-336 (1932)." There it was said:

> "The action of the Secretary is, nevertheless, subject to some judicial review, as the court below held. The courts may determine whether his action is within his statutory authority, compare *Gonzales* v. *Williams,* 192 U. S. 1, *Gegiow* v. *Uhl,* 239 U. S. 3, whether there was any evidence before him to support his determination, compare *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, and whether the procedure he adopted in making it satisfied elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized. Compare *Kwock Jan Fat* v. *White,* 253 U. S. 454; *Tang Tun* v. *Edsell,* 223 U. S. 673; *Chin Yow* v. *United States,* 208 U. S. 8, 12; *The Japanese Immigrant Case,* 189 U. S. 86, 100, 101; see *United States e.r. Iorio* v. *Day,* 34 F. (2d) 920; *Whitfield* v. *Hanges,* 222 Fed. 745."

The Report of the Secretary of Labor's Committee, after reviewing the development of the concept of a fair hearing, said with specific reference to the above quoted paragraph from the *Lloyd Sabaudo* case:

> "This statement represents nothing less than a transformation in judicial doctrine when compared with the doctrines enunciated in the *Nishimura Ekiu, Fong Yue Ting* and immediately succeeding cases. Beginning with a conception of the immigration agencies as independent tribunals possessing substantially final authority with respect to all matters of construction

and application of the immigration laws, the Court has swung around to a conception of them as, in effect, subordinate tribunals—entrusted, to be sure, with a wide range of discretion but subject to pervasive control by the courts. *The powers attributed to executive officers in the early decisions were justified as resulting from the peculiarly absolute power of Congress over the admission and expulsion of aliens. Yet the powers attributed to them in Mr. Justice Stone's statement in the Elting case are not materially greater than the powers admittedly possessed by many administrative agencies over essential interests of citizens. And the restraints to which they are declared to be subject are not materially less.*"

For present purposes the importance of this historic change of front by the Supreme Court is twofold:

"*First,* it gives warning of the dangers of relying on the earlier decisions of the Court as a measure of the present position of the Department. The Committee has found repeated indications of an assumption within the Department that any hearing which may be accorded an alien is a privilege and not a right. Such an assumption can only be explained as an uncritical carry-over of presuppositions drawn from judicial expressions which no longer are authoritative. It will not survive an attentive reading of the later, and controlling cases." (Italics supplied.)

There is no doubt that the courts have consistently since the time of the *Lloyd Sabaudo* case taken the same view as did the Secretary of Labor's Committee as to the right of aliens to fair administrative hearings and have regarded it as being indistinguishable from the fair administrative hearings required in other departments of administrative law.

Numerous cases decided under statutes requiring hearing have used language which leaves no question that the courts regarded a fair hearing as being a constitutional as

well as a statutory requirement. In *United States ex rel. Brandt* v. *District Director of Immigration,* 40 Fed. Supp. 371 (D. C. N. Y. 1941) an alien arriving entirely without documents was said to be constitutionally entitled to a hearing on the question of whether he came within a category of emergency cases which the Secretary of State was authorized to define. Similarly, in *Johnson* v. *Tertzag,* 2 F. 2(d) 40 (D. C. Mass.) 1924, the court left no doubt as to its view of the administrative power exercised in exclusion cases. With respect to this power the court, quoting from *Kwock Jan Fat* v. *White,* 253 U. S. 454 at 464, stated:

> "It is a power to be administered, not arbitrarily or secretly, but fairly and openly under the restraints and principles of free government applicable where the fundamental rights of men are involved, regardless of their origins or race. It is the province of the courts, in proceedings for review . . . to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment."

In *Ex Parte Petkos,* 212 Fed. 275 (D. C. Mass. 1913, reversed on other grounds, 214 Fed. 978) the court similarly indicated its views as to the constitutional requirement for a fair hearing, held that there had not been such a hearing and made the following statement as to the specific fault it found with the hearing which had been granted:

> "He was never apprised of the evidence on which he is to be deported and has had no opportunity to meet it" (p. 278).

Compare *United States ex rel. Reimann* v. *Martin,* 193 Fed. 795; *Gung You* v. *Nagle,* 34 F. 2(d) 848; *Tod* v. *Waldman,* 266 U. S. 113; *O'Connell ex rel. Foo* v. *Ward,* 126 F. 2(d) 615.

See also as supporting the right to a fair hearing in exclusion cases article in the January 1945 *Immigration and*

Naturalization Service, Monthly Review, published by the Department of Justice; the statement by Commissioner Carusi in the February, 1947 *Immigration and Naturalization Service Monthly, Review,* page 101, to the effect that: "An alien seeking to enter the United States is entitled to a fair hearing . . ." And see Note 13, Columbia Law Review 1013.

In its brief in opposition to certiorari in the case of *Knauff* v. *Watkins,* 173 F. (2d) 599 (C. C. A. 2, 1949, certiorari granted May 2, 1949) the Government conceded that usually an arriving alien is entitled to a hearing. Mrs. Knauff was excluded on a charge similar to that presented herein. The Government stated at p. 11 in the Knauff brief:

> "The denial of a hearing to an alien seeking admission is indeed, an extraordinary measure, and it is invoked in exceptional cases where the disclosure of the basis of exclusion would be prejudicial to the public interest. (See 8 C. F. R. 175.57 (b) supra). This authority stems from the Passport Act (Pet. 33) and is limited in its application to a time of war or national emergency."

It is submitted that neither the Passport Act, the Presidential Proclamation, nor the administrative practice over more than twenty years authorize the denial of hearings to arriving aliens.

The Passport Act of May 22, 1918 (40 Stat. 559) was a World War I measure which was substantially the same as the present Act of June 21, 1941 (55 Stat. 252). The 1918 statute was limited to war-time but was later extended as to its non-criminal features into peacetime by the Act of March 2, 1921 (41 Stat. 1217). *U. S. ex rel. Le Grazie* v. *Wallis,* 278 Fed. 838 (S. D. N. Y. 1921); *U. S. ex rel. London* v. *Phelps,* 22 F. (2d) 288 (C. C. A. 2, 1927). The 1941 amendment to the Passport Act confined it again but this time to

war in which the United States was involved, national emergency or war between any two states. Thus the statute has been in force ever since 1918.

On August 8, 1918 Presidential Proclamation No. 1473 (effective from August 8, 1918, to July 1, 1924) was issued. It provided for the exclusion of aliens unless it appeared that there was "reasonable necessity" for his entry and that such entry would not be prejudicial to the interests of the United States. The proclamation specifically provided that it was to be regarded "as additional" to the immigration laws and regulations and that it "shall not be held to suspend or supersede them" except as mentioned in the proclamation.

Regulations were issued thereunder by the Secretary of State and were effective from September 15, 1918 until February 1, 1925. Section 31 of the regulations required arriving aliens to submit visaed passports. (Executive Order No. 2932 of August 8, 1918). Subsequent regulations issued under the Passport Act of 1918 as amended always related to documentary requirements of arriving aliens:

Executive Orders Nos. 4125 of January 12, 1925, 4476 of July 12, 1926, 4813 of February 21, 1928, 5426 of August 20, 1930, 5869 of June 30, 1932, 6986 of March 9, 1935, 7865 of April 12, 1938, 8029 of December 27, 1938; 8430 of June 5, 1940 and 8766 of June 3, 1941.

The consistent administrative practice during this period was to interpret the Passport Act as authorizing the imposition of additional grounds upon the entry of aliens. The authority was exercised to require visaed passports. During World War I and until November 14, 1941 arriving aliens were always accorded hearings as a matter of right under the Immigration Act of February 5, 1917 (8 U. S. C. 152).

On June 21, 1941, Congress amended the Passport Act of 1918 to authorize the President to impose additional conditions on the entry or departure of aliens whenever there

was a state of war between any two states, a national emergency or during wartime (22 U. S. C. 223-226, 55 Stat. 252; Public Law 114, 77th Congress).

On November 14, 1941, the President issued Proclamation No. 2523 which was based upon the existence of a national emergency and a state of war between two foreign states. The proclamation authorized the denial of entry to aliens where it appeared to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in rules and regulations authorized to be prescribed by the Secretary of State with the concurrence of the Attorney General. By 8 Code of Federal Regulations 175.53, the classes of aliens whose entry was deemed prejudicial were defined to include anarchists, those opposed to measures adopted in the national defense of the United States or of the Western Hemisphere, those engaged in rebellion or plotting to destroy defense materials of the United States, those whose entry would endanger public safety, certain alien enemies, war criminals and cases presenting circumstances of similar character. 8 Code of Federal Regulations 175.57 authorizes the temporary exclusion of aliens by the Department of Justice and provides that an alien "shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States. Any alien so temporarily excluded by any other officials shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that the admission of the alien would not be prejudicial to the interests of the United States."

Paragraph (b) of this section of the regulations provides that no hearing by a Board of Special Inquiry shall be held until after the case is reported to the Attorney General

and such a hearing is directed by the Attorney General or his representative. It is further provided that in any special case a hearing may be denied where the Attorney General determines that it is on the basis of "information of a confidential nature, the disclosure of which would be prejudicial to the public interest."

The 1941 amendment to the Passport Act made no material change. It authorized the President upon a proclamation finding that it was necessary to impose restrictions and prohibitions in *addition* to those otherwise provided to make it unlawful for an alien to enter "except under such reasonable rules, regulations, and orders and subject to such limitations and exceptions as the President shall prescribe."

Presidential Proclamation No. 2523 was issued on the basis of the National Emergency proclaimed on May 27, 1941. It requires aliens to present passports and excludes aliens whose entry the Secretary of State finds prejudicial.

It will be observed that no provision is made in the statute or the proclamation for the suspension of hearings heretofore granted for over twenty years under the statute to arriving aliens. In the light of the history of the statute, and the administrative practice thereunder, *in the absence of explicit language, there should be a strong presumption that Congress did not intend to authorize the denial of a hearing to an arriving alien. Congress did not explicitly authorize the President to deny a hearing nor did the Presidential Proclamation contain any such explicit authorization.*

The authorization to deny a hearing is contained in 8 C.F.R. 175.57b. It is submitted that the regulations exceed the authority delegated by the statute and the proclamation.

Instead of imposing *additional* conditions on entering aliens, the regulations do two things: First, they exclude those already excludable under existing law as in the case of

Communists and those who would endanger public safety; secondly, they eliminate hearings under 8 C.F.R. 175.57. If the statute and proclamation authorize the suspension of hearings, then the Secretary of State is authorized to nullify or abrogate all our immigration laws. Nowhere is there any intimation that Congress intended to grant such untrammelled authority. Exclusion hearings are granted when a subversive is denied entry under the Act of October 16, 1918 (8 U.S.C. 137). But where he is suspected of subversion and denied entry under the regulation which incorporates that same statute (8 C.F.R. 175.53) he may be denied a hearing under 8 C.F.R. 175.57(b) on the ground that ex parte information against him is confidential.

As recently as April 12, 1948, the United States Court of Appeals for the District of Columbia in the case of *Wilson* v. *Federal Communications Commission,* 170 Fed. 2(d) 793, 802, cited the *Japanese Immigrant* case, *supra,* as authority for determining that a hearing was constitutionally required under a section of the Federal Communications Act which did not specifically provide for a hearing.

It is submitted that the regulations eliminating hearings in the light of a long history affording hearings should not be tolerated in the absence of express statutory authority. (*The Japanese Immigrant* case, *supra; Wilson* v. *Federal Communications Commission, supra.*) It is apparent from these cases and numerous others to the same effect that the construction placed upon the statute and the proclamation is one which the courts hold improper on the ground that if so construed the statute would be unconstitutional.

In the instant case, unlike *Ludecke* v. *Watkins,* 335 U. S. 160, we have an existing immigration statute which specifically provides for a hearing and which is considered as a part of the regular immigration laws. (See: *Admission of Aliens into the United States* by Department of State, 1932 ed. which lists the Passport Act of 1918 as an immigration

law). Unlike the *Ludecke* case, the statute herein has been interpreted administratively for twenty years to grant a hearing; unlike *Ludecke,* the appellant is not an alien enemy and unlike *Ludecke* we are dealing here with a proclamation based not upon the war power but one promulgated on November 14, 1941 and based upon (a) the existence of a national emergency and (b) a state of war between two states other than the United States. It seems clear that what may be done to an enemy during wartime under another statute provides no precedent for treatment of a friendly alien under powers other than the war powers. It is a fact that the emergency proclaimed by President Roosevelt on May 27, 1941 is not in existence today nor are two states at war with each other as was true on November 14, 1941. We therefore question whether the Proclamation of November 14, 1941 is still in force. In any event the emergency upon which it was based can confer no power to perform acts otherwise unconstitutional. See: *Home Bldg. & Loan Asso.* v. *Blaisdell,* 290 U. S. 398, 426. Denial of hearings is not in conformity with the statute and proclamation and is unconstitutional as shown above. The "emergency" cannot authorize such denial. The war power might permit such denial if properly invoked. But war between nations other than the United States does not give basis for invocation of that power. The substantially unlimited scope given to governmental authorities under the war power is itself the strongest possible reason for exercising extreme caution in finding that that power has been invoked. Thus the doctrine of *Korematsu* v. *United States,* 323 U. S. 214, and *Hirabayashi* v. *United States,* 335 U. S. 160, that American citizens may be subjected to unequal treatment affecting their liberties upon the basis of race or ancestry (See: Dembitz, *Racial Discrimination and the Military Judgment,* 40 Columbia L. Rev. 175) is in itself sufficiently shocking so that the power permitting such action must obviously be limited to

cases in which it is explicitly invoked and warranted by statute and proclamation. Such is not the case here.

Point IV

The Statute Herein Is Void for Undue Delegation of Legislative Power to the Executive and for Vagueness

Even war criminals outside of the boundaries of the United States and without claim of right to enter the United States have been given access to our courts to raise the question whether their trials had been conducted in conformity with the requirements of due process. See *Matter of Yamashita,* 327 U. S. 1 (1946).

In *Knauff* v. *Watkins, supra,* it was held that an alien was not entitled to procedural due process. That decision is now before the Supreme Court and is contrary to the decision in the District of Columbia Circuit in *Eisenstrager* v. *Forrestal,* 174 F. (2d) 961 (1949).

If an alien is entitled to procedural due process, he may complain that the statute is vague and improperly delegates legislative powers.

The statute authorizes the President to prescribe additional conditions on the entry and departure of aliens (22 U. S. C. 223-226). It does not define a class of inadmissible aliens. By proclamation the President banned the entry of aliens where it appeared to the Secretary of State that such entry would be "prejudicial to the interests of the United States." The proclamation itself does not define or delimit the category of aliens whose entry would be prejudicial.

A similar statute was suggested in the 75th Congress in 1937. S. 1363 was a bill introduced by Senator Reynolds to deny visas to any alien whose presence in the United States was deemed inimical to the public interest, and to refer

such cases to the President. Gerard Reilly, Acting Solicitor of Labor, opposed the bill with this comment:

> "Because of its vagueness as to the group of aliens sought to be denied visas, it would be difficult for the Secretary of State to determine which classes should be brought to the attention of the President. If the Congress intends to exclude additional classes from admission to the United States, those classes should be set forth in the law with definiteness."

A similar comment was made with reference to S. 1366 in the 75th Congress, 1st Session, by Frances Perkins, Secretary of Labor. See *Hearing before Senate Subcommittee on Deportation of Aliens,* April, 1937, at p. 13. In the 76th Congress, First Session, S. 411 was introduced by Senator Reynolds. This is a bill to provide for the deportation of aliens inimical to the public interest. Frances Perkins, Secretary of Labor, and Edward Shaughnessy, Deputy Commissioner of Immigration, both opposed this bill on the ground that its provisions were so vague as to make responsible administration of it impracticable. The Secretary of Labor stated:

> "Existing provisions of law have brought about the deportation each year of an average of 3,500 criminals, narcotic violators, immoral persons, mentally or physically defective aliens, anarchists, and kindred classes, whose presence in the United States is considered as not being in the best interests of the country. I suppose that this bill by referring to aliens 'inimical to the public interest' refers to aliens not within that group. I also presume that the Secretary of Labor, on whose warrant such aliens are to be deported, must determine in what cases an alien's presence is to be regarded as inimical to the public interest. The bill fails to define the terms 'inimical' or 'public interest' so that it is altogether indefinite as to what is to be regarded as

> the public interest or under what circumstances an alien's presence is to be regarded as inimical thereto. On the whole, I think the provision is so vague as to make responsible administration of it impracticable."
>
> See *Hearings on Deportation of Aliens,* 76th Congress 1st Session (March, 1939) at pp. 12 and 26.

The instant statute falls within the proscription set forth in the above communication on S. 1363, S. 1366 and S. 411 as well as within the proscription of *Schechter Poultry Corp.* v. *U. S.,* 295 U. S. 495 at 529, and *Panama Refining Co.* v. *Ryan,* 293 U. S. 388. In the *Schechter* case, *supra,* it was stated:

> "Instead of prescribing rules of conduct, it (the statute) authorizes the making of codes to prescribe them. For that legislative undertaking section 3 sets up no standards. . . . We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

The instant statute merely authorized the imposition of additional conditions upon entry. No standards were set, nor were the functions of the President delineated in any way. If S. 1363, S. 1366 and S. 411 were vague, and responsible administration of the same impracticable, the Act of June 21, 1941, attacked herein, presents an *a fortiori* case. In the instant case, one has to look beyond the statute to the Presidential Proclamation to find any standards whatever and even the standard there found conveys no suggestion as to the limits or the manner of its exercise. It therefore seems clear that the instant statute falls within the unconstitutional proscription noted above.

Conclusion

The instant case presents important questions of Federal jurisdiction and constitutional law.

The issue presented under the Declaratory Judgment Act affects many cases pending in immigration and other matters in the District of Columbia and elsewhere and should be settled by a Supreme Court ruling. Whether the jurisdictional limitation of *Ahrens* v. *Clark*, 335 U. S. 188, should be applied to declaratory judgment actions as well as to habeas corpus can only be decided authoritatively by the Supreme Court. Actions for review under the Administrative Procedure Act pursuant to 5 U. S. C. 1009 have likewise not as yet had the benefit of judicial decision by this Court. These important jurisdictional problems should be decided with the finality of a Supreme Court ruling so that courts and lawyers throughout the land may determine cases on their merits without dispute as to the procedural aspects of their controversies.

On the merits, this case presents the important constitutional issue raised in the *Knauff* case, *supra.*

The post-war, anti-alien hysteria of World War I is recorded in a book entitled "The Deportation Deliriums of Nineteen-Twenty" by Louis F. Post, former Assistant Secretary of Labor. Star chamber proceedings against aliens and illegal arrests in deportation cases were the general rule. "The records of accusation and evidence for which the Department of Justice made itself responsible through its secret-service auxiliary, and which are now in the files of the Bureau of Immigration by the thousands, would disgrace the judgment of any lawyer who dared cite them in vindication of the epidemic of arrests to which they relate." *Post, supra,* p. 310.

Today, there is an epidemic of exclusions of aliens on a basis, not prescribed by statute, but purportedly under a

statute—a ground designated as "prejudicial to the interests of the United States." Where an alien is a known Communist, he may be excluded under the Act of October 16, 1918. But under that Act he is granted a hearing. However, if an alien is merely suspected of Communist activity as in the instant case, or if the ex parte evidence against him is weak and unconvincing, by resorting to 8 CFR 175.57, the Attorney General may exclude him, without a hearing, without confronting him with the charges, and without granting him representation by counsel.

Should this power be sustained, then authorization will be given to the Department of Justice to exclude any alien on unfounded hearsay and surmise built on suspicions. This is the surest way to return immigration to the star chamber days of an earlier post-war hysteria.

The Department of Justice arbitrarily detained Mrs. Kaminer and an eight-year-old child without a hearing until the present litigation was instituted. When a hearing was held not a word was developed to indicate that their entry would be against the interests of the United States. What safeguards are there that Mr. Kaminer is not the subject of a similar arbitrary detention, the result of mistaken identity, or that he is not the object of unfounded charges hurled at him by vindictive and biased enemies? A hearing will enable him to meet the charges against him. A hearing will enable the government to test the reliability of its ex parte investigation in accordance with traditional concepts of Anglo-American principles.

The statute and proclamations herein have not authorized a denial of a hearing. Petitioner may bring this action and test the constitutionality of the statute which as noted above is unconstitutional as construed to deny a hearing, and for vagueness, and improper delegation.

It is therefore respectfully submitted that the review sought herein should be granted, that petitioner has been denied due process, and that a writ of certiorari should issue.

Respectfully submitted,

JACK WASSERMAN,
IRVING JAFFE,
Attorneys for Petitioner,
Warner Bldg.,
Washington, D. C.

GASPARE CUSUMANO,
THOMAS M. COOLEY II,
Of Counsel.

APPENDIX

Section 16 of the Immigration Act of February 5, 1917 (8 U. S. C. 152 provides in part:

> "All aliens arriving at ports of the United States shall be examined by at least two immigrant inspectors at the discretion of the Attorney General and under such regulations as he may prescribe. • • •
>
> "Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry."

Passport Act of May 22, 1918 as amended by Act of June 21, 1941 (22 U. S. C. 223-226) provides:

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe; . . ."

Presidential Proclamation No. 2523 of November 14, 1941.

WHEREAS the act of Congress approved on May 22, 1918 (40 Stat. 559), as amended by the Act of Congress approved

on June 21, 1941 (Public Law 114, 77th Conf.; chap. 210, 1st sess; 55 Stat. 252), vests authority in me to impose restrictions and prohibitions in addition to those otherwise provided by law upon the departure of persons from and their entry into the United States when the United States is at war, or during the existence of the national emergency proclaimed by the President on May 27, 1941, or, as to aliens, whenever there exists a state of war between or among two or more states, and when I find that the interests of the United States so require; and

WHEREAS the national emergency proclaimed by me on May 27, 1941, is still existing; and

WHEREAS there unhappily exists a state of war between or among two or more states and open hostilities engage a large part of the Eastern Hemisphere; and

WHEREAS the exigencies of the present international situation and of the national defense require that restrictions and prohibitions in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States, including the Panama Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States:

NOW, THEREFORE, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority vested in me as set forth above, do hereby find and publicly proclaim and declare that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, shall be imposed upon the departure of persons from and their entry into the United States, including the Panama Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States; and I make the following rules, regulations, and orders which shall remain in force and effect until otherwise ordered by me:

* * * * * * *

(3) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to

enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter in accordance with the rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of these rules, regulations, and orders.

No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General. . . .

---

8 Code of Federal Regulations 175

175.53 Title 8—Aliens and Nationality

175.53 *Classes of aliens whose entry is deemed to be prejudicial to the public interest.* The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States for the purposes of these regulations:

(a) Any alien who belongs to one of the classes specified in the Act of October 16, 1918, as amended. (40 Stat. 1012; 41 Stat. 1008-9; 54 Stat. 673; 8 U.S.C. 137.)

(b) Any alien who is a member of, affiliated with, or may be active in the United States in connection with or on behalf of, a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest, or in the interest of national defense, or in the interest of the common defense of the countries of the Western Hemisphere, or in the prosecution of the war.

(c) Any alien in possession of, or seeking to procure, unauthorized secret information concerning the plans, preparations, equipment, or establishments for the national

defense of, or the prosecution of the war by, the United States.

(d) Any alien engaged in activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of the measures adopted by the Government of the United States for the defense of the United States or for the defense of any other country, or the prosecution of the war.

(e) Any alien engaged in activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of any plans made or steps taken by any country of the Western Hemisphere in the interest of the common defense of the countries of such Hemisphere.

(f) Any alien engaged in organizing, teaching, advocating, or directing any rebellion, insurrection, or violent uprising against the United States.

(g) Any alien engaged in a plot or plan to destroy materials, or sources thereof, vital to the defense of, or the prosecution of the war by, the United States, or to the effectiveness of the measures adopted by the United States for the defense of any other country.

(h) Any alien whose admission would endanger the public safety, as provided in any Executive order issued in pursuance of the act of Congress approved June 20, 1941 (ch. 209, 55 Stat. 252; 22 U.S.C., Sup. 228-229).

(i) Any alien enemy: *Provided,* that this excluding provision shall not apply to aliens who

(1) Present valid permits to enter issued on or after November 14, 1941, or are exempted under these regulations from presenting permits to enter and are found to be otherwise admissible under these regulations; or

(2) Before September 1, 1939, became and still are citizens or subjects of any foreign country at war with Japan and who have not, since September 1, 1939, and before May 8, 1945, returned to any enemy or enemy-controlled territory; or

(3) Are under 14 years of age; or

(4) Are excepted from the excluding provisions of this subsection in the discretion of the permit-issuing authority or of the Secretary of State.

(j) Any alien found to be, or charged with being, a war criminal by the appropriate authorities of the United States or one of its co-belligerents, or an alien who has been guilty of, or who has advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of the Axis countries during the present World War.

(k) Any alien who is not within one or more of the classes defined in (a) to (j), inclusive, but in whose case circumstances of a similar character may be found to exist, which render the alien's admission prejudicial to the interests of the United States, which it was the purpose of the act of June 21, 1941 (55 Stat. 252) to safeguard."

"175.57 *Entry not permitted in special cases.*

(a) Any alien, even though in possession of a permit to enter, or exempted under these regulations from obtaining a permit to enter, may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable under one of the categories set forth in sec. 175.53. The official excluding the alien shall immediately report the facts to the head of his department, who will communicate such report to the Secretary of State. Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States. Any alien so temporarily excluded by any other official shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that the admission of the alien would not be prejudicial to the interests of the United States.

(b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he

is, or may be, excludable under one or more of the categories set forth in sec. 175.53, no hearing by a board of special inquiry shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in sec. 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."

FILE COPY

FILED
NOV 4 194
CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 346

LEON KAMINER,

Petitioner,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

JACK WASSERMAN,
IRVING JAFFE,
Attorneys for Petitioner,
Warner Bldg.,
Washington 4, D. C.

GASPARE CUSUMANO,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 346

LEON KAMINER,

Petitioner,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

The Government, recognizing the applicability of *Perkins* v. *Elg*, 307 U. S. 325 and *U. S. ex rel. Trimler* v. *Carusi*, 166 F. (2d) 457 to the jurisdictional issue herein, distinguishes those cases on the ground that the plaintiffs therein were not detained in another district (Respondents' Brief, pp. 8-9).

1. Petitioner asserts that declaratory judgment is not dependent upon the presence of a plaintiff within the court's jurisdiction. Otherwise declaratory judgment would not be available to a nonresident plaintiff who seeks relief in a

federal court, on the basis of diversity of citizenship. Likewise declaratory relief in a civil action, as is the case herein, should not be dependent on whether or not a plaintiff is detained. If petitioner were denied admission to the United States administratively, and was not detained but paroled pending enactment of legislation or litigation in a related case, habeas corpus would be unavailable and the controversy here would be just as real for the purposes of declaratory judgment. The availability of habeas corpus is not a ground for denying declaratory judgment. Rule 57, Rules of Federal Procedure.

2. The claim is made in respondents' brief (p. 9, footnote 7) that a special statute was required to grant jurisdiction to the District of Columbia Court of citizenship questions (8 U. S. C. 903). This is completely incorrect. Such jurisdiction existed before (*Perkins* v. *Elg*, 307 U. S. 325). The statute granted the complainant the option of bringing suit in the place of his asserted domicile. Normally suit could not be brought at his domicile if it were outside the District of Columbia because of lack of jurisdiction over the Attorney General or the Secretary of State.

3. This is not an action for habeas corpus and for that reason *Ahrens* v. *Clark*, 335 U. S. 188, is inapplicable. No request was made here as in the *Ahrens* case that process issue into another district contrary to the well-defined limitations which have historically surrounded the writ of habeas corpus.

The declaratory judgment statute requires that the controversy, *i. e.*, the subject matter, be within the jurisdiction of the District Court. It does not and never has required the physical presence of the plaintiff within its territorial jurisdiction.

Petitioner invoked the aid of the District Court because he was denied a hearing. He does not seek a judicial de-

termination that he is entitled to release and admission to the United States but merely a declaration that he is entitled to a regular immigration administrative hearing. It was for this reason—because petitioner is not entitled to outright release until a hearing has been completed—that petitioner sought declaratory judgment and review under the Administrative Procedure Act rather than habeas corpus. The respondent's quotation of Prof. Borchard (Brief p. 11) indicates that prejudice by "*actual* or potential adverse claims of others" is sufficient to support declaratory relief. Although declaratory judgment action may have been intended primarily to be preventative it does not preclude curative relief.

4. The petitioner invokes the jurisdiction of the District Court under the Administrative Procedure Act, 5 U. S. C. 1009, as well as under the Declaratory Judgment Act. That such jurisdiction exists to review an immigration order of the respondents has been judicially established. *Scholnick* v. *Clark,* 81 F. Supp. 298; *U. S. ex rel. Trinler* v. *Carusi,* 166 F. (2d) 457. The respondents do not answer our contention on this issue.

We submit that the District Court had jurisdiction herein and that certiorari should be granted.

Respectfully submitted,

JACK WASSERMAN,
IRVING JAFFE,
Attorneys for Petitioner,
Warner Bldg.,
Washington, D. C.

GASPARE CUSUMANO,
Of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	7
Conclusion	12

CITATIONS

Cases:

Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 227	7
Ahrens v. *Clark*, 335 U. S. 188	8, 11
Clark v. *Memolo*, 174 F. 2d 978	7, 8
Knauff v. *Shaughnessy*, No. 54, O.T. 1949	3, 7
Perkins v. *Elg*, 99 F. 2d 408, modified, 307 U. S. 325	8, 9
Price v. *Johnston*, 334 U. S. 266	10
Salinger v. *Loisel*, 265 U. S. 224	10
United States ex rel. Trinler v. *Carusi*, 166 F. 2d 457	8, 9

Statutes:

Act of May 22, 1918, c. 81, 40 Stat. 559, as amended by the Act of June 21, 1941, c. 210, Sec. 1, 55 Stat. 252 (22 U.S.C. 223)	3, 4
Federal Declaratory Judgment Act (28 U.S.C. [1948 rev.] 22201)	2, 3, 7, 8, 9
Nationality Act of 1940 (54 Stat. 1137, 1171; 8 U.S.C. 903):	
Section 503	9
28 U. S. C. [1948 rev.] 1253	5
28 U. S. C. [1948 rev.] 2255	8
28 U. S. C. [1948 rev.] 2282	4
28 U. S. C. [1948 rev.] 2284	4

Miscellaneous:

Federal Rules of Civil Procedure, Rule 57	8
H. R. 4337, 73rd Cong., 2d sess.	10
H. Rep. No. 1264, 73rd Cong., 2d sess.	10
Presidential Proclamation No. 2523 of November 14, 1941 (6 F. R. 5821-5823)	3
Regulations issued pursuant to Presidential Proclamation No. 2523, 8 C. F. R. 175.53, 175.57	3

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 346

LEON KAMINER, PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 23-25) is not reported. The *per curiam* opinion of the Court of Appeals (R. 27-28) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered July 11, 1949 (R. 29). The petition for

a writ of certiorari was filed September 22, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien in custody in the Southern District of New York pursuant to an allegedly illegal order of permanent exclusion may seek in the District Court for the District of Columbia, under the Federal Declaratory Judgment Act, a judicial declaration that the order is void and the detention illegal, or whether he should be required to seek redress by writ of habeas corpus in the district of detention.

STATUTE INVOLVED

The Federal Declaratory Judgment Act (48 Stat. 955, 28 U.S.C. [1948 rev.] 2201) provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

Petitioner, an alien, arrived at the Port of New York on October 16, 1948 (R. 2, 9). He was temporarily detained at Ellis Island pending further

investigation of his eligibility to enter the United States (R. 12). On December 28, 1948, the Attorney General, on the basis of evidence and information of a confidential nature, the disclosure of which was deemed by him to be prejudicial to the public interest, ordered petitioner to be permanently excluded from the United States, without a hearing before a board of special inquiry, as an alien whose admission would be prejudicial to the interests of the United States (R. 12-13). On March 3, 1949, the Secretary of State, after consultation with the Attorney General, likewise directed that petitioner be permanently excluded, thereby confirming the previous order of the Attorney General (R. 13, 20).[1]

On January 8, 1949, following the entry of the Attorney General's order of permanent exclusion, petitioner filed in the District Court for the District of Columbia, pursuant to 28 U.S.C. [1948 rev.] 2201, *supra*, p. 2, a petition for a declaratory judgment (R. 1-6), which gave rise to the instant

---

[1] The orders of the Attorney General and Secretary of State were made pursuant to 8 C.F.R. 175.53 and 175.57, regulations issued pursuant to Presidential Proclamation No. 2523 of November 14, 1941 (6 F. R. 5821-5823), which Proclamation, in turn, was issued under the authority of Section 1 of the Act of May 22, 1918, c. 81, 40 Stat. 559, as amended by the Act of June 21, 1941, c. 210, § 1, 55 Stat. 252 (22 U.S.C. 223). See R. 2-3, 10-12.

The pattern of the legislation, Presidential Proclamation, and regulations referred to is set forth in our brief in opposition in *Knauff* v. *Shaughnessy*, No. 54, this Term, pending on writ of certiorari, which involves, *inter alia*, the question of the constitutionality of the exclusion procedure thereby established.

proceeding. The petition asked that a decree be entered declaring the procedure established by Section 1 of the Act of May 22, 1918, as amended by the Act of June 21, 1941, and by the Presidential Proclamation and regulations issued pursuant thereto (see footnote 1, *supra,* p. 3), to be unconstitutional, particularly in so far as this procedure authorizes the exclusion of an alien without a hearing before a board of special inquiry. The petition also prayed that petitioner's continued detention without a hearing be declared illegal, and that the order of permanent exclusion be declared void. Ancillary injunctive relief was also requested. (R. 5.)

On February 12, 1949, pursuant to 28 U.S.C. [1948 rev.] 2282 and 2284, a three-judge statutory district court, consisting of Circuit Judge Proctor and District Judges Letts and Holtzoff, was convened to determine the constitutional issue presented by the petition for declaratory and injunctive relief (R. 7). The three-judge court held, in a memorandum opinion filed March 7, 1949 (R. 13-14), that "Without expressing any opinion as to whether the plaintiff has pursued a proper remedy, * * * an alien seeking entry into the United States has no standing to attack the constitutionality of an Act of Congress and that, in any event, the Act in question is constitutional." The cause was ordered remanded to "a single judge for such further proceedings as may be ap-

propriate" (R. 14). Petitioner took no appeal from this decision of the three-judge court under 28 U.S.C. [1948 rev.] 1253 (see Pet. 8).

The single-judge district court (Holtzoff, D. J.), on April 1, 1949, entered an order dismissing the petition for a declaratory judgment (R. 20). In an accompanying opinion (R. 23-25), Judge Holtzoff, after referring to the fact that the constitutional issue had been disposed of by the three-judge court, said (R. 23-24):

> It seems to the Court that this is the type of case in which the Court should decline to entertain actions for declaratory judgment. An alien seeking admission to this country, who is excluded by the action of immigration authorities, has a remedy by way of a writ of habeas corpus. Such a proceeding necessarily must be brought in the district in which the alien is being detained. That generally is the district of the port of entry. His action for a declaratory judgment, however, may be brought only in the United States District Court for the District of Columbia, because the defendant would be either the Attorney General or the Commissioner of Immigration and Naturalization, or both, each of which officials is a resident of the District of Columbia.
>
> It is inconceivable and even appalling that every exclusion and deportation order should be capable of being brought for a review into the District of Columbia. If that were possible, the administration of the immigration

> laws would be greatly hampered, impeded and interfered with. On the other hand, the plaintiff is fully protected by being permitted to have the administrative action reviewed in a habeas corpus proceeding in the proper district, which in this instance is the Southern District of New York.

On appeal to the Court of Appeals for the District of Columbia Circuit, the order dismissing the petition for a declaratory judgment was affirmed (R. 29), the court observing in a *per curiam* opinion (R. 28):

> While this suit is for a declaratory judgment, it is substantially similar to an application for a writ of *habeas corpus,* because, in addition to the claim of unconstitutionality, it complains that the appellant's detention without a hearing is unlawful. *Habeas corpus* would lie only in the Southern District of New York, where the appellant was detained on Ellis Island at the time this suit was instituted. An action for declaratory judgment cannot be substituted for *habeas corpus* so as to give jurisdiction to a district other than that in which the applicant is confined or restrained. If the appellant has a right to the sort of declaratory judgment which he seeks, he must assert it in the Southern District of New York, as he would be required to do if he had elected to apply for a writ of *habeas corpus.* The District Court properly dismissed the action, because it lacked jurisdiction.
>
> We express no opinion, and mean to inti-

mate none, as to whether the appellant is entitled either to a writ of *habeas corpus* or to a declaratory judgment.

ARGUMENT

Petitioner argues (Pet. 15-28) constitutional issues which he asserts are presented by the legislation, Presidential Proclamation, and regulations (see footnote 1, *supra,* p. 3) pursuant to which he was ordered permanently excluded from the country without a hearing before a board of special inquiry, but it is clear that these issues are not properly before the Court in this proceeding.[2] The sole ground of the Court of Appeals' affirmance of the District Court's dismissal of the petition for a declaratory judgment was the District Court's lack of jurisdiction to entertain it. We think the Court of Appeals' judgment is correct.

The operation of the Declaratory Judgment Act, *supra,* p. 2, is procedural only; it merely provides a new remedy in cases or controversies otherwise cognizable by federal district courts. *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240. It does not enlarge the jurisdiction of district courts. *Clark* v. *Memolo,* 174 F. 2d 978, 980 (C.A.D.C.). Apart from specific exceptions created by Congress, the jurisdiction of district courts is territorial, and the power of a district court to inquire into restraints of liberty is limited to cases of persons

[2] Such issues are involved in *Knauff* v. *Shaughnessy,* a habeas corpus case pending on writ of certiorari, No. 54, this Term.

who are confined or restrained within its territorial jurisdiction;[3] it is not sufficient that the jailor or custodian alone be found in that jurisdiction. *Ahrens* v. *Clark,* 335 U. S. 188, 190-192.[4] Since petitioner is now confined in the Southern District of New York, it is plain that the United States District Court for the District of Columbia derives no power from the Declaratory Judgment Act,[5] which is procedural only, to effect his release indirectly by a declaration of rights. In other words, if that court has no power to inquire into the alleged restraint of petitioner's liberty, it has no power to effect his release under any form of procedure. Cf. *Clark* v. *Memolo, supra. Perkins* v. *Elg,* 99 F. 2d 408 (C.A.D.C.), modified, 307 U. S. 325, and *United States ex rel. Trinler* v. *Carusi,* 166

---

[3] The only statutory exception to the territorial limitation on jurisdiction in restraint-of-liberty cases appears to be 28 U.S.C. 2255, which now authorizes a convicting court to grant the relief normally afforded by a writ of habeas corpus, regardless of where the convicted person happens to be incarcerated.

[4] It is significant that the words "within its jurisdiction" appearing in the Declaratory Judgment Act, *supra,* p 2, are in substance the same as the words "Within their respective jurisdictions" appearing in the habeas corpus statute, which were construed by this Court in the *Ahrens* case.

[5] The provision in Rule 57 of the Federal Rules of Civil Procedure, which reads: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate," is clearly not applicable in cases where the court in which declaratory relief is sought is without jurisdiction to adjudicate the basic issue presented.

F. 2d 457 (C.A. 3),[6] on which petitioner relies (Pet. 7-8, 9-10, 13), are plainly distinguishable from the case at bar. In those cases, the complainants were not in custody (see 99 F. 2d at pages 413-414 and 166 F. 2d at page 459), and neither of the courts in those cases was called upon to make an inquiry into the cause of a restraint of liberty.

We submit that the language of the Declaratory Judgment Act plainly warrants a construction which denies a district court jurisdiction to inquire into the cause of restraints of liberty unless the restraint takes place within its territorial jurisdiction. And considerations of policy support that construction, for, as District Judge Holtzoff observed in this case (R. 24; see p. 5, *supra*), "It is inconceivable and even appalling that every exclusion and deportation order should be capable of being brought for a review into the District of Columbia." In the absence of unequivocal language to that effect, it would be improper to impute to Congress an intention to subject the United States District Court for the District of Columbia to such an enormous burden,[7] especially when, as in this

---

[6] Mandate recalled, judgment vacated, and cause dismissed as abated for failure to make timely substitution, 168 F. 2d 1014.

[7] In this connection, it is significant that Congress when enacting a special declaratory judgment statute (limited to United States citizenship questions) used express language to accomplish its purpose where its desire was that suits thereunder might, at the wish of the complainant, be brought in the District of Columbia court. See Section 503, Nationality Act of 1940 (54 Stat. 1137, 1171; 8 U.S.C. 903).

case, a habeas corpus proceeding in the jurisdiction where the restraint takes place, affords a plain and adequate remedy. A construction of the Declaratory Judgment Act which requires a person who claims to be unlawfully detained to seek relief in the particular jurisdiction where he is confined, makes for orderly judicial administration and avoids the possibility of having a tremendous burden thrown on one court. It will likewise avoid unnecessary litigation, since it is not clear that a denial of relief on the merits in a suit brought in the District of Columbia for declaratory relief would be *res judicata* in a subsequent habeas corpus proceeding brought in the jurisdiction where the complainant is detained. Cf. *Salinger* v. *Loisel,* 265 U. S. 224, 230; *Price* v. *Johnston,* 334 U. S. 266, 287-290.

That the declaratory judgment action was intended by Congress to be preventive rather than curative, and therefore not a substitute for the writ of habeas corpus, is indicated by the statement in the committee report (H. Rep. No. 1264, 73d Cong., 2d sess.) accompanying the bill (H. R. 4337) which later became the Declaratory Judgment Act, reading as follows:

> The principle involved in this form of procedure is to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts.

A most simple and striking definition of the procedure is thus made by Professor Borchard, of the Yale University School of Law. He writes:

> The declaratory judgment, it will be recalled, enables parties who are uncertain of their legal rights, and are pecuniarily or otherwise prejudiced by actual or potential adverse claims by others, to invoke the aid of the courts for the determination of their rights before an injury has been done.
>
> Therefore, this form of preventive relief is distinguishable from curative relief in that the latter is incapable of redress until an injury has occurred or the contract broken.

Here, petitioner is in actual custody, awaiting deportation pursuant to an order of permanent exclusion. The "injury has occurred." If his detention is unlawful, habeas corpus in the Southern District of New York, where he is detained, affords a plain and adequate remedy. The courts below were right, therefore, in denying him judicial review by means of a declaratory judgment action in the District of Columbia. Cf. *Ahrens* v. *Clark, supra.*

CONCLUSION

The petition for a writ of certiorari presents no question meriting further review by this Court, and should therefore, it is respectfully submitted, be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
JOHN R. BENNEY,
PHILIP R. MONAHAN,
Attorneys.

OCTOBER 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 699744 349